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71-1217

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971
NO.

SOLOMON GOLDBERG, also known as
SAUL GOULD,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI
DIRECTED TO THE UNITED STATES
COURT OF APPEALS FOR THE
NINTH CIRCUIT

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TO THE HONORABLE WARREN BURGER, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Solomon Goldberg, also known as Saul Gould, respectfully petitions this Honorable Court for a writ of certiorari directed to the Court of Appeals for the Ninth Circuit to review and reverse and render void three judgments, to-wit, on Counts Seven, Eight and Nine, on an indictment on which defendant was tried and convicted and placed on probation for

three years.

JURISDICTION

Jurisdiction is conferred by Title 28, Section 1254, U.S.C.

The decision of the Court of Appeals was rendered February 24, 1972. This petition for certiorari is being filed within 30 days of the decision of the Court of Appeals.

OPINION BELOW

The opinion below is attached hereto as an Appendix A. Petitioner believes that the printed opinion in the official reports has not yet been published.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment - "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, ..."

THE FACTS

Petitioner was indicted in three counts of a 39 count indictment charging several persons with mail fraud in the use of credit cards in violation of Title 18, Sec. 1341, U.S.C., and Title 18, Sec. 2, U.S.C., aiding and abetting.

Because petitioner was charged in only three counts, the court granted a severance of his trial and the trial of Thomas W. Lefner from the other defen-

dants. The case against Lefner was later dismissed before trial.

Briefly, a conspiracy was alleged in Count One, naming several persons in an alleged scheme to purchase air line tickets through credit cards from various air line companies and travel agencies on credit for use by passengers whose names were to be supplied by the defendant Robert S. Kelem (C.T. 3) and that no payment was intended to be made for the tickets.

Petitioner was charged with having made purchases of three air line tickets from United Air Lines through travel agencies on his valid credit card and to have delivered them to Robert S. Kelem, who was operating a discount house and who in turn sold these tickets to three purchasers at a discount. The total amount involved in these three transactions as found by the court in its judgment was $1514.46.

Unlike the other cases involving other defendants, petitioner had paid a small amount on account and agreed with the air lines to pay any amount that it was determined was due, but because of the instruction of his attorney that payment pending litigation might amount to compounding a felony, it was delayed.

Petitioner contended that such delay, if it occurred, did not constitute mail fraud within the provisions of Title 18, Sec. 1341, U.S.C.

The trial court, instead of submitting the case to the trial jury on the indictment as returned by the grand jury, para-

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Petitioner contended that such delay, if it occurred, did not constitute mail fraud within the provisions of Title 18, Sec. 1341, U.S.C.

The trial court, instead of submitting the case to the trial jury on the indictment as returned by the grand jury, para-

phrased Count One of the indictment and omitted a portion of it and omitted a portion of the indictment in each of Counts Seven, Eight and Nine, upon which petitioner was tried. It was petitioner's contention that the alterations, amendments and changes in the indictment as voted by the grand jury rendered it null and void.

It was also the contention of the petitioner that the mailings involved were not caused by petitioner, nor were these mailings for the purpose of executing the scheme within the meaning of Title 18, Sec. 1341.

It was further the contention of the petitioner that there was no scheme involved and that the court should have granted judgments of acquittal.

The evidence was uncontradicted that Saul Gould had paid various sums of money to United Air Lines and had agreed on a settlement of his account with Mr. Meyerhof, a collection agency dealing with and handling United Air Lines collections accounts, but that the settlement had failed due to the activity of Mr. Gould's attorney and would have to await the determination of the trial. (R.T. 266-267)

Mr. Gould told Mr. Meyerhof he would pay the account if Mr. Lavine okayed it. (R.T. 270)

QUESTIONS PRESENTED

1. Whether the failure to try the petitioner by the indictment as returned

by the grand jury violated petitioner's rights under the Fifth Amendment to the Constitution of the United States and rendered the proceedings null and void.

2. Whether the court lost jurisdiction when it attempted to place petitioner on trial on an indictment as amended by the court.

3. Whether the court erred in instructing the jury on the indictment as cut up and paraphrased by the judge. (R.T. 323, et seq.) (Indictment as modified)

4. Whether the indictment charges mail fraud within the meaning of Parr v. U.S., 363 US 370, 4 L.ed.2d 1277, and Kann v. U.S., 323 US 88, 89 L.ed. 92.

5. Whether the petitioner was entitled to judgments of acquittal on each of the three counts.

6. Whether the jury was correctly instructed in response to its question that it sent to the judge during deliberation as follows: "Does the law state that the defendant must knowingly and willfully cause the mails to be used or does the law state that a violation can occur knowingly or not?" (R.T. 350, 353)

7. Whether there is no evidence that Mr. Gould knowingly and willfully caused the mails to be used and therefore his conviction, without any evidence, violates due process of law.

REASONS FOR GRANTING THE WRIT

Petitioner was not tried on the indict-

ment returned by the grand jury but on the indictment as altered and amended by the court, omitting certain portions of the indictment in each count as well as eliminating a portion of Count One which the other counts adopted by reference. This voided the indictment and rendered the trial nugatory. Contrary to the statement in the opinion of the Court of Appeals, an acquiescence by defense counsel, if it occurred, could not make an invalid indictment valid nor could it be legal to try one on an altered indictment. (Ex parte Bain, 121 US 1, 30 L.ed. 849; U.S. v. Norris, 281 US 619; Stirone v. U.S., 361 US 212; Russell v. U.S., 369 US 749, 8 L.ed.2d 240, 255)

In Russell v. U.S., 369 US 749, 770, 771, 8 L.ed.2d 254, 255, the court said:

> "A grand jury, in order to make that ultimate determination, must necessarily determine what the question under inquiry was. To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. ... 'If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been call-

ed to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says "no person shall be held to answer," may be frittered away until its value is almost destroyed. ...'"

II

THE INDICTMENT FAILED TO CHARGE AN OFFENSE AGAINST THE LAWS OF THE UNITED STATES AND PARTICULARLY "MAIL FRAUD".

The charge in this case, to-wit, mail fraud, did not state an offense against the laws of the United States. The federal mail fraud statute does not purport to reach all frauds, but only limited instances in which the use of the mail is part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law. (Parr v. U.S., 363 US 370, 4 L.ed.2d 1277, 1291; Kann v. U.S., 323 US 88, 89 L.ed. 88)

As to the petitioner in Counts Seven, Eight and Nine, where billings or sendings of invoices by the travel agencies to the United Air Lines are concerned, nothing in the charges about petitioner caused these billings to be made or that they were for the purpose of executing a scheme or that he had any knowledge of them or that it would make the transaction a violation of the mail fraud statute. (Parr v. U.S., 363 US 370, 393, 4 L.ed. 2d 1277, 1291; Kann v. U.S., 323 US 88,

89 L.ed. 88)

Furthermore, the receipt of tickets by the purchasers from a travel agency terminated the transaction as far as petitioner was concerned and any acts thereafter could not be in furtherance of any scheme to defraud.

Furthermore, the evidence showed that petitioner was negotiating to settle his account with the air line and this whole prosecution was an effort to have the government assist in collections to be made. This is not mail fraud.

When the jury was deliberating it sent down the following note: "Does the law state that defendant must knowingly and willfully cause the mails to be used or does the law state that a violation can occur knowingly or not. Robert A. Biggs, Foreman."

There is no evidence that Mr. Gould knowingly and willfully caused the mails to be used. The testimony is that he had no knowledge as to whether the mails were or were not going to be used and the testimony further is that he had no knowledge that the mails ever actually were used.

The mailing of the three travel agencies was done at a time that Mr. Gould was not present nor did he tell them or inform them as to any use of the mails.

In Parr v. U.S., 363 US 370, 4 L.ed. 2d 1277 at 1289, the Court said:

"'[t]he federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law.' Kann v. United States, 323 US 88, 95, 89 L.ed. 88, 96, 65 S. Ct. 148, 157 ALR 406. Therefore, only if the mailings were 'a part of the execution of the fraud,' or, as we said in Pereira v. United States, 347 US 1, 8, 98 L.ed. 435, 444, 74 S.Ct. 358, were 'incident to an essential part of the scheme,' do they fall within the ban of the federal mail fraud statute."

The court further said in Parr v. U.S., at 4 L.ed.2d 1291:

"Counts 17, 18 and 19 of the indictment relate to a different subject. They charged, and there was evidence tending to show, that petitioners Oscar Carrillo, Sr., and Garza fraudulently obtained gasoline and other filling station products and services for themselves upon the credit card and at the expense of the District knowing, or charged with knowledge, that the oil company would use the mails in billing the District for those things. The mailings complained of in those counts were two invoices, said to contain amounts for items so procured by Carrillo

and Garza, mailed by the oil company, at Houston, to the District, at Benavides, and the District's check mailed to the oil company, at Houston, in payment of the latter invoide. We think these counts are ruled by Kann v. United States (US) supra. Here, as in Kann [t]he scheme in each case had reached fruition' when Carrillo and Garza received the goods and services complained of. 'The persons intended to receive the [goods and services] had received [them] irrevocably. It was immaterial to them, or to any consummation of the scheme, how the [oil company] ... would collect from the [District]. It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires.' 323 US at 94."

III

THE SETTLED RULE IN THE FEDERAL COURT IS THAT AN INDICTMENT MAY NOT BE AMENDED EXCEPT BY RE-SUBMISSION TO THE GRAND JURY UNLESS THE CHANGE IS MERELY A MATTER OF FORM. (RUSSELL V. U. S., 369 US 749, 8 L.ED.2d 254)

The dismissal of Kelem in the last sentence of Count One of the indictment terminated the efficiency and power of Count One in the indictment. Therefore, the allegations in Counts Seven, Eight and Nine reading "The grand jury re-alleges all of the allegations of the

first count of this indictment, except those contained in the last paragraph thereof" no longer has any potency or efficiency. Not only is the court or prosecutor powerless to alter an indictment, but the grand jury also is powerless to incorporate by reference only part of the first count and not all of it.

IV

CONVICTION OF A PERSON WITH NO EVIDENCE WHATEVER IN THE RECORD TO SUPPORT IT IS A VIOLATION OF DUE PROCESS OF LAW. (SHUTTLESWORTH V. BIRMINGHAM, 382 US 87, 15 L.ed. 2d 176; THOMPSON V. CITY OF LOUISVILLE, 362 US 199, 4 L.ed. 2d 654; GARNER V. LOUISIANA, 368 US 157, 7 L. ed.2d 207)

The court should have granted motions for judgment of acquittal made at the end of the government's case and made at the end of the petitioner's case. There was no proof that the mails were a part of the execution of a fraud, "leaving all other cases to be dealt with by appropriate state law". There is no evidence that petitioner knew that the mails were a part of any scheme and that the mails were willfully and knowingly used in the execution of any scheme. (Parr v. U.S., 363 US 370, 393, 4 L.ed.2d 1277, 1291; Kann v. U.S., 323 US 88, 89 L.ed. 88)

The evidence was also insufficient to prove that there was any scheme. Nothing in the testimony of Kelem

revealed any scheme or any scheme to defraud. There was no evidence of any scheme. The court said that it took two people, the defendant and another, to make a scheme. "It had to be Gould and Kelem devising a scheme." (R.T. 293) But the government dismissed the case against Kelem in Count One, thus establishing that there was no scheme as to Gould alone. It is like a retraxit in a civil case, or the elimination of one of two people when they are charged with a conspiracy, leaving only one, and there cannot be a "scheme" with only one person left, in any event.

Therefore, the court should have granted the judgments of acquittal as requested by the defense counsel. (C.T. 86-96)

(Motions for acquittal as to Counts Six, Seven and Eight are on C.T. 86, et seq.; denied at C.T. 96)

CONCLUSION

WHEREFORE, petitioner prays for the granting of a writ of certiorari and an order reversing the judgment as to each count and an order to dismiss the cause for want of a valid indictment as returned by the grand jury and for want of any evidence justifying the convictions and further because the mail fraud statute is not meant to apply under the facts of this case.

Respectfully submitted,

MORRIS LAVINE

Attorney for Petitioner

APPENDIX A

NO. 71-1513
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff and Appellee,

vs.

SOLOMON GOLDBERG, also known as SAUL GOULD,

Defendant and Appellant.

[February 24, 1972]

On Appeal from the United States District Court for the Central District of California

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Before: BROWNING and TRASK, Circuit Judges; and BATTIN,* District Judge

PER CURIAM:

Appellant was charged with three counts of mail fraud in violation of 18 U.S.C. Sec. 1341. He was found guilty and convicted on all three counts. The indictment charged that appellant purchased airline tickets from United Airlines on a credit card with

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*Honorable James F. Battin, United States District Judge, District of Montana, sitting by designation.

no intention of paying the charges incurred. He then sold the tickets at a reduced rate to defendant Kelem, who in turn sold them at reduced rates to the public.

Three basic issues are presented on appeal:

1. Whether the trial court erred in deleting portions of the indictment when read to the jury, both at the beginning of the trial and during the giving of instructions;

2. Whether the indictment properly charged mail fraud in violation of 18 U.S.C. Sec. 1341;

3. Whether the evidence was sufficient to support guilty verdicts.

When the court read the indictment to the jury, it omitted references to Kelem as an aider and abettor in Counts Seven, Eight and Nine and omitted parts of Count One in the indictment which referred also to Kelem. Appellant did not object to these omissions, but rather expressed agreement with the court's action. Assuming the issue to be properly before the court, it is without merit, since it is only necessary that the jury be fairly apprised of the nature of the charge, and that does not necessarily require a reading of the indictment to the jury either in whole or in part. Robles v. United States, 279 F.2d 401, 403-04 (9th Cir. 1960). This requirement was met.

The essential elements of mail fraud

under 18 U.S.C. Sec. 1341 are (1) a scheme to defraud and (2) a knowing use of the mail to execute the scheme. United States v. Regent Office Supply Co., 421 F.2d 1174, 1180 (2nd Cir. 1970). Those elements were charged in the indictment. It is not necessary to show that reliance of the victim was induced by misrepresentation of the defendant, nor is it necessary to show that the victim was misled. Regent, supra, at 1180-81; Erwin v. United States, 242 F.2d 336, 337 (6th Cir. 1957).

The evidence introduced was sufficient to support a conviction under the indictment. See United States v. Kelem, 416 F.2d 346 (9th Cir. 1969).

Affirmed.

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

NO. 71-1217

CHEVRON OIL COMPANY
THE CALIFORNIA COMPANY DIVISION,
Petitioner,

versus

ROYAL INSURANCE COMPANY, EXCESS-SURPLUS LINES, INC., and or UNDERWRITERS AT LLOYD'S, LONDON and MR. MINOR CHERAMIE and or CHERAMIE BO-TRUC NO. 5, INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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OCTOBER TERM 1971

NO. 71-1217

CHEVRON OIL COMPANY
THE CALIFORNIA COMPANY DIVISION,

Petitioner,

versus

ROYAL INSURANCE COMPANY, EXCESS-SURPLUS LINES, INC., and/or UNDERWRITERS AT LLOYD'S, LONDON and MR. MINOR CHERAMIE and/or CHERAMIE BO-TRUC NO. 5, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MAY IT PLEASE THE COURT:

The petition in this case is nothing more than a disguised attack on the findings of fact of the District Judge. A crane owned by Chevron, situated on a Chevron fixed platform in the Gulf of Mexico and operated by a Chevron employee was the instrumentality which caused negligent injury to a crewmember of a vessel alongside the platform to off-load equipment. Neither the vessel nor her crew was found to have played any part in causing the injury. The Chief Judge of the Appellate Court was prompted to comment:

> "The fact findings — which no one can, or does, challenge — are specific. The vessel and her crew were, on the one hand, absolved from all wrong or unseaworthiness. Chevron, on the other hand, was found at fault for the manner in which the crane was operated. The vessel offered nothing further than a condition or locale for the accident."

While Chevron was named as an assured in the vessel's P & I policy, no liability was imposed on Chevron *vis-a-vis* the vessel. The P & I policy did not insure Chevron's liability as a platform owner and operator. This was the holding of the courts below.[1] The absence of vessel liability is a matter of fact which is not subject to attack in this forum. We respectfully submit that there is no proper premise for review by this Court and certiorari should be denied.

Respectfully submitted,

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[1] The lower courts cited as authority an arbitration proceeding entitled "In the Matter of Barge BW-133 Fire", 1968 A.M.C. 2738.

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OCTOBER TERM, 1971

SOLOMON GOLDBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1217

SOLOMON GOLDBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION

The *per curiam* opinion of the court of appeals (Pet. App. A) is reported at 455 F. 2d 479.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1972. The petition for a writ of certiorari was filed on March 24, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in reading the indictment to the jury, the court erred in omitting references to a codefendant not on trial.

2. Whether the indictment properly charged mail fraud violations of 18 U.S.C. 1341.

3. Whether the evidence was sufficient to support petitioner's conviction.

STATEMENT

A thirty-nine count indictment charged petitioner and eight others in the United States District Court for the Central District of California with a mail fraud scheme in violation of 18 U.S.C. 1341 (C.T. 2-43).[1] Count 1 described a scheme to defraud United Airlines and others by using credit cards to make purchases of airline tickets over a period of time with no intention of paying for them, and by later selling them at a reduced rate to defendant Kelem, who in turn would sell them at reduced rates to the public. Counts 1 and 2 charged mail fraud violations by Kelem. The other 37 counts charged mail fraud violations by the other defendants and aiding and abetting by Kelem. After a jury trial of petitioner alone on counts 7, 8 and 9 (C.T. 11-13),

[1] "C.T." refers to the Court's Transcript; "R.T." to the Reporter's Transcript, copies of which we have lodged with the Clerk of this Court.

he was found guilty on all three counts (R. 355-356).[2] On October 19, 1970, imposition of sentence was suspended; petitioner was placed on probation for three years and ordered to make restitution to United Airlines in the amount of $1,514.66 (R.T. 383-384). The court of appeals affirmed the conviction *per curiam* (Pet. App. A).

The evidence showed that in the summer of 1966, petitioner was informed by Kelem, a friend for fifteen years and the owner of a Hollywood discount shop, that he needed airline tickets for customers. Petitioner offered to supply the tickets to Kelem for 85 percent of their face value (R.T. 103-105). In June 1966 Kelem requested tickets of petitioner for J. Paul Levine and his wife and child; in August 1966, for one Ratner; and in October 1966, for a Mr. and Mrs. Hodges and a Mrs. Young (R.T. 106-107). On each occasion petitioner used a United Airlines credit card issued in his own name, and was identified as the person who had purchased the tickets at three different travel agencies (R.T. 93, 112-113, 138). In connection with two of the purchases, petitioner identified himself as a relative of the persons in whose name the tickets were being written, in compliance with United Airlines policy that a credit

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[2] Prior to petitioner's conviction, the cases against the other defendants had been disposed of. The convictions of Kelem and Gartrell had been affirmed in a comprehensive opinion delineating the nature and operation of the scheme to defraud. *United States* v. *Kelem*, 416 F. 2d 346 (C.A. 9), certiorari denied, 397 U.S. 952.

card could be used only by the holder and members of his family (R.T. 114, 140, 197).

Levine and Ratner paid Kelem approximately 85 percent of the face value of the tickets (R.T. 70, 129). One Irvin, who purchased the tickets for the Hodges and Mrs. Young, paid with merchandise and a due bill (R.T. 77-80). After each of the three ticket purchases, an employee of the travel agency placed in the United States mail for delivery to United Airlines in Chicago a copy of the invoice evidencing the credit card purchase (R.T. 88-89, 119, 141-142). The policy of United Airlines was that the credit card invoice be mailed to Chicago within twenty-four hours of purchase (R.T. 89). On one occasion, petitioner asked a travel agent to "hold off sending a ticket until the following day to Chicago, because he already has his limit for that day" (R.T. 95).

United Airlines cancelled petitioner's credit card on September 27, 1966 (R.T. 205). Prior to that time, on July 18, 1966, petitioner had made a $147.33 payment when his total indebtedness to United Airlines was $2,545.31; and on August 25, 1966, a $254.53 payment when his total indebtedness was $2,942.57 (R.T. 200-202). On March 30, 1967, petitioner made a third payment with a $250 check when his total indebtedness was $14,386.64, but the check was returned because of insufficient funds (R.T. 202, 210, 220).

ARGUMENT

1. At the beginning of the trial the court told the jury that the indictment charged violations against numerous persons, but that they should be concerned only with charges against petitioner (R.T. 7). The court read the part of count 1 describing in general terms the fraudulent credit card scheme (R.T. 7-10). Since paragraph 4 did not mention petitioner, his counsel agreed that it was not necessary to read it (R.T. 10). Petitioner's counsel also agreed that it was unnecessary to read the concluding paragraph of count 1 charging defendant Kelem with a substantive mail fraud offense (R.T. 12). The court, without defense objection, also refrained from reading the final paragraph of counts 7, 8, and 9 which charged Kelem with having aided and abetted petitioner in committing the offenses under those counts (R.T. 12-14). Substantially the same procedure was followed in reading parts of the indictment in the final instructions to the jury (R.T. 323-328).

Contrary to petitioner's contention, the trial court did not err when in reading the indictment to the jury it omitted the references mentioned above. Although it was necessary that the jury be advised of the nature of the charges against petitioner, this did "not necessarily require a reading of the indictment to the jury either in whole or in part." *Robles* v. *United States*, 279 F. 2d 401, 403-404 (C.A. 9); *Martin* v. *United States*, 335 F. 2d 945, 950 (C.A. 9); *Nick* v. *United States*, 122 F. 2d 660, 670 (C.A.

8), certiorari denied, 314 U.S. 687. A sufficient part of the indictment was read to meet the requirement that the jury be fairly apprised of the nature of the charges against petitioner. We note that since the court properly instructed that the indictment was only an accusation of crime and not evidence (R.T. 318), the reading of only the pertinent part of the indictment could not constitute prejudicial error.

Contrary to petitioner's contention (Pet. 5-7), he was not convicted under an indictment different from the one charged by the grand jury, as proscribed in cases such as *Ex parte Bain*, 121 U.S. 1, and *Stirone* v. *United States*, 361 U.S. 212. The indictment itself was not amended in any way; parts of it, referring to other defendants, were omitted in the reading to the jury only for the purpose of clarity in focusing attention upon the specific charges against petitioner.

2. There is no merit to petitioner's contention that the indictment did not properly charge a mail fraud violation of 18 U.S.C. 1341. Under that section the elements of the offense are (1) a scheme to defraud, and (2) mailing of the matter involved for the purpose of executing the scheme. *Pereira* v. *United States*, 347 U.S. 1, 8; *United States* v. *Blosser*, 440 F. 2d 697, 700 (C.A. 10); *United States* v. *Regent Office Supply Co.*, 421 F. 2d 1174 (C.A. 2). The indictment in this case contained these essential allegations (C.T. 1-4, 11-13) and was legally sufficient. *United States* v. *Sampson*, 371 U.S. 75; *Dra-*

now v. *United States*, 307 F. 2d 545, 557-558 (C.A. 8).[3]

3. The evidence, as summarized in the Statement, *supra*, was sufficient to support petitioner's conviction. It disclosed both the scheme to defraud and the mailing procedures involved for the purpose of executing the scheme. It was not necessary that the prosecution show that petitioner authorized mailing the various invoices evidencing the credit card purchases; it was sufficient to show his knowledge that in the execution of the scheme the invoices were likely to be mailed. *United States* v. *Sternback*, 402 F. 2d 353, 354-355 (C.A. 7), certiorari denied, 393 U.S. 1082. Since petitioner, with knowledge that use of the mails would follow in the ordinary course of business, purposely followed a course of conduct designed to invoke the mailing procedures of United Airlines, he "caused" the mailings within the terms of the statute. *Pereira* v. *United States*, 347 U.S. 1, 8-9; *United States* v. *Kelem*, 416 F. 2d 346, 348-349 (C.A. 9), certiorari denied, 397 U.S. 952.

Nor was petitioner's conviction invalid under *Kann* v. *United States*, 323 U.S. 88, and *Parr* v. *United States*, 363 U.S. 370, on the ground that since the mailings occurred after he had accomplished his ob-

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[3] Petitioner argues that since the government had dismissed count 1 as to Kelem, its subject matter could not be realleged in counts 7, 8 and 9 to give them validity (Pet. 10-11). The record, however, shows that the government had not moved to dismiss count 1, but that Kelem had been found guilty and sentenced on that count (R.T. 231).

jective by obtaining the airline tickets, the mailings could not have been for the purpose of executing the scheme. This Court held in *United States* v. *Sampson*, 371 U.S. 75, 80:

> We are unable to find anything in either the *Kann* or the *Parr* case which suggests that the Court was laying down an automatic rule that a deliberate, planned use of the mails after the victims' money had been obtained can never be "for the purpose of executing" the defendants' scheme. Rather the Court found only that under the facts in those cases the schemes had been fully executed before the mails were used. And Court of Appeals decisions rendered both before and after *Kann* have followed the view that subsequent mailings can in some circumstances provide the basis for an indictment under the mail fraud statutes.

Here the mailings plainly furthered the scheme to defraud. See *Kelem*, *supra*.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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